Nos. 14-614 and 14-623

In the Supreme Court of the United States

W. KEVIN HUGHES, CHAIRMAN, MARYLAND PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

TALEN ENERGY MARKETING, LLC, FKA PPL ENERGYPLUS, LLC, ET AL.

CPV MARYLAND, LLC, PETITIONER

v.

TALEN ENERGY MARKETING, LLC, FKA PPL ENERGYPLUS, LLC, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MAX MINZNER
General Counsel
ROBERT H. SOLOMON
Solicitor
CAROL J. BANTA
KARIN L. LARSON
LISA B. LUFTIG
ROSS R. FULTON
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's exclusive jurisdiction over rates for the wholesale supply of electricity under the Federal Power Act, 16 U.S.C. 791a *et seq.*, preempts a Maryland law that requires electric distribution companies to pay to state-selected generators subsidies that are directly tied to the clearing price of the wholesale electric capacity auction conducted by PJM Interconnection, LLC, if those generators bid into and clear the auction.

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INTEREST OF THE UNITED STATES

This case concerns whether the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, preempts a Maryland program that requires electric distribution companies to pay subsidies to state-selected generators if those generators bid into and clear the wholesale electric capacity auction conducted by PJM Interconnection, LLC (PJM), which operates within the regulatory jurisdiction of the Federal Energy Regulatory Commission (FERC or Commission). Because this case

directly implicates FERC's regulatory responsibilities, the United States has a substantial interest in the Court's resolution of the preemption issue. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

A. Regulatory And Technical Background

1. The electric power system consists of three components: the generation of electricity at power plants and other facilities; the transmission of electricity over long distances on high-voltage lines; and the distribution of electricity to end users by "load-serving entities" on low-voltage lines. Office of Enforcement, FERC, *Energy Primer: A Handbook of Energy Market Basics* 47, 57 (Nov. 2015) (*Energy Primer*).[1] Originally "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," *New York* v. *FERC*, 535 U.S. 1, 5 (2002), and its sale was regulated only by the States. This Court held in 1927, however, that the Commerce Clause bars the States from regulating certain interstate electricity transactions, such as wholesale sales of power (*i.e.*, sales for resale) across state lines. *Id.* at 5-6 (citing *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927)).

Congress responded to the *Attleboro* decision by enacting the FPA, ch. 687, Tit. II, 49 Stat. 847. The FPA authorized the Federal Power Commission, FERC's predecessor, to regulate certain components of the electric-power system. 16 U.S.C. 792; see 42

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[1] http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

U.S.C. 7151(b), 7172(a)(1). Section 824(b) of the FPA grants FERC jurisdiction over (i) "the sale of electric energy at wholesale in interstate commerce," and (ii) "the transmission of electric energy in interstate commerce." 16 U.S.C. 824(b)(1).

Sections 824d and 824e in turn set forth FERC's core regulatory duties. First, those sections provide that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" interstate transmissions or wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," shall be "just and reasonable." 16 U.S.C. 824d(a); see 16 U.S.C. 824d(b), 824e(a). Second, if FERC finds that "any rate, charge, or classification," or "any rule, regulation, practice, or contract affecting such rate, charge, or classification," is "unjust, unreasonable, unduly discriminatory or preferential," FERC shall determine and prescribe what is just and reasonable. 16 U.S.C. 824e(a).

The FPA also establishes specific limits on FERC's authority that preserve exclusive state jurisdiction over certain matters. With respect to sales, Section 824(b) provides that, apart from the sales specifically identified in the FPA, the statute "shall not apply to any other sale of electric energy." 16 U.S.C. 824(b)(1). For that reason, FERC lacks jurisdiction to regulate retail sales (*i.e.*, sales to users of electricity), which have long been regulated by state utility commissions. *New York*, 535 U.S. at 16-17, 23. Section 824(b) further provides that FERC "shall not have jurisdiction, except as specifically provided in this subchapter or subchapter III of this chapter, over facilities used for the generation of electric energy[,] or over facilities used in local distribution or only for the transmission

of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1). Such facilities are subject to state regulation. See *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-206 (1983).

2. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition in the Nation's electricity system. Independent power generators—that is, generators that do not own transmission lines or distribution facilities —have proliferated. See *Transmission Access Policy Study Grp.* v. *FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (per curiam), aff'd *sub nom. New York*, *supra*. And "unlike the local power networks of the past," the electricity grid is now national in scope, such that "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York*, 535 U.S. at 7. As a consequence, "it is now possible for power companies to transmit electric energy over long distances at a low cost." *Id.* at 7-8. But major utilities by and large still own the high-voltage transmission lines. That ownership could permit them "either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions." *Id.* at 8-9.

To address that threat to competition, Congress amended the FPA in Title VII of the Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-726, 106 Stat. 2915-2921. Those amendments authorize FERC to order utilities that own transmission lines to transmit power sold by competitors. See 16 U.S.C. 824j-824k. In 1996, after issuing a series of utility-specific orders,

FERC invoked its powers under Sections 824d and 824e to promulgate a general rule addressing the matter. See *New York*, 535 U.S. at 9-11. That rule requires transmission-owning utilities to file tariffs offering nondiscriminatory "open access" transmission services to wholesale power suppliers on standard terms. *Id.* at 11-12.

In the past two decades, FERC has continued to "break down regulatory and economic barriers that hinder a free market in wholesale electricity" and to "promote competition in those areas of the industry amenable to competition." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) (*Morgan Stanley*). Rather than directly approving or setting wholesale rates to ensure that they are just and reasonable, the Commission increasingly has sought to achieve its regulatory aims through market mechanisms. See *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 482-485 (D.C. Cir. 2009), cert. denied, 558 U.S. 1110 (2010) (*Connecticut*). Under market-based rate setting, generators and load-serving local utilities generally have two methods to buy and sell electricity in wholesale markets. They may enter into private bilateral contracts for electricity, which, if the product of good-faith, arm's length negotiation, are presumed to be just and reasonable. See *Morgan Stanley*, 554 U.S. at 545-546; see also *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010). They may also purchase from, and sell to, a Commission-approved nonprofit "Regional Transmission Organization[]" or "Independent System Operator[]." *Morgan Stanley*, 554 U.S. at 536-537.

"To further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently," FERC issued a rule encouraging transmission-owning utilities to relinquish control of their transmission lines to the wholesale-market operators, which are charged with operating organized wholesale markets in a nondiscriminatory manner. *Morgan Stanley*, 554 U.S. at 536-537. The Nation's seven wholesale-market operators—New England Independent System Operators (ISO), New York ISO, PJM, Midcontinent ISO, Southwest Power Pool, California ISO, and the Electric Reliability Council of Texas—together now serve two-thirds of the national electricity load. *Energy Primer* 40. They are responsible for "[e]nsur[ing] the reliability of the transmission grid," "balanc[ing] supply and demand instantaneously," and "plan[ning] for transmission expansion on a regional basis." *Id.* at 58.

3. PJM is a wholesale-market operator that administers a large regional market in the Mid-Atlantic region, which includes Maryland. PJM—named after the first three States (Pennsylvania, New Jersey, and Maryland) where it was developed, *Energy Primer* 93—operates both energy and capacity markets. The energy market consists of real-time and day-ahead auction markets that set the rates for wholesale electricity in the PJM region. See *id.* at 64. Using sophisticated computerized systems, the wholesale-market operators match up generators' bids to supply electricity at specified prices with electricity demand from load-serving entities, which then deliver power to consumers in the state-regulated retail market. *Ibid.*;

see, *e.g.*, PJM, *PJM Markets* (May 14, 2015).[2] Each accepted bid is paid the "locational marginal price," which represents the least-cost price of meeting a marginal increase in demand at each of the many geographic nodes within a region, and so reflects the value of electricity at particular locations and times. *Energy Primer* 73.

The capacity market—at issue here—is forward-looking, providing the option to buy and sell capacity to satisfy future demand and, where appropriate, spur investment in additional infrastructure. 14-614 Pet. App. (Pet. App.) 11a. The capacity market "provide[s] a means for [load-serving entities] to procure capacity needed to meet forecast load and to allow generators to recover a portion of their fixed costs." *Energy Primer* 96. To ensure that sufficient capacity will be available, PJM holds an annual auction for energy that will be available three years in the future. Pet. App. 11a. PJM determines how much capacity the region will acquire for the relevant year based on supply offers and a sloped demand curve that considers both reliability needs and price. *Ibid.*; *Energy Primer* 96. PJM also determines how much of the region's capacity each load-serving entity is responsible for acquiring. PJM, Reliability Assurance Agreement Among Load Serving Entities in the PJM Region, Art. 7.2 (Sept. 17, 2010) (PJM Reliability Assurance Agreement).[3]

Under PJM's FERC-approved tariff, generators, as well as utilities that have purchased capacity from existing generators under long-term bilateral con-

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[2] http://www.pjm.com/~/media/about-pjm/newsroom/fact-sheets/%20pjms-markets-fact-sheet.ashx.

[3] http://www.pjm.com/media/documents/merged-tariffs/raa.pdf.

tracts, commit to sell—and PJM commits to purchase —the amount of capacity that is selected in the auction for resale to load serving entities in three years' time. Pet. App. 11a-12a. In order for capacity purchased by a utility through a bilateral contract to count toward the utility's share of the capacity that PJM determines the utility must procure, that resource must be bid into and "clear" the capacity auction. PJM Reliability Assurance Agreement, Art. 7.3.

PJM accepts bids from lowest to highest until it has reached the requisite capacity. Pet. App. 11a. The highest bid selected becomes the "market-clearing price." *Ibid.* Any generator or other entity that bids at or below the clearing price "clears" the auction. *Ibid.* Those providers receive the clearing price for their capacity, regardless of their bid price. *Ibid.* PJM's process for determining the appropriate price per unit is known as the Reliability Pricing Model. *Ibid.*; *Energy Primer* 96; see *Maryland Pub. Serv. Comm'n* v. *FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (per curiam). The Commission oversees PJM's operation of its organized-capacity market, the terms and conditions of participation in that market, and the wholesale rates produced by that market. *Maryland Pub. Serv. Comm'n*, 632 F.3d at 1284-1285 (detailing FERC's approval of PJM's Reliability Pricing Model). A competitive capacity market provides price signals to build new generation capacity when it is needed. See *ibid.*; Pet. App. 11a-12a; cf. *Connecticut*, 569 F.3d at 480 ("[U]sing competitive bidding for future capacity contracts * * * both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.").

Existing generators and other existing providers of capacity may bid zero as "price-takers," meaning they agree to sell at whatever the clearing price may be. Pet. App. 11a; see *id.* at 94a. New capacity, however, is subject to the "minimum offer price rule," which FERC instituted in 2006. *Id.* at 12a. That rule requires new generators in certain circumstances to bid at or above a default price specified by PJM, unless a particular generator can demonstrate that its actual costs are lower than the default price. *Id.* at 12a, 94a; see *PPL EnergyPlus, LLC* v. *Hanna*, 977 F. Supp. 2d 372, 400 (D.N.J. 2013), aff'd *sub nom. PPL EnergyPlus, LLC* v. *Solomon*, 766 F.3d 241 (3d Cir. 2014), petitions for cert. pending, No. 14-634 (filed Nov. 26, 2014), and No. 14-694 (filed Dec. 10, 2014). That rule seeks to prevent the manipulation of clearing prices by net purchasers of capacity—*i.e.*, entities that purchase more capacity than they sell into the market and that thus have an incentive to keep capacity prices as low as possible. See *Hanna*, 977 F. Supp. 2d at 390-391. To support new entry in certain circumstances where price signals alone may be insufficient to incentivize new generation, PJM also provides for a new entry price adjustment (NEPA). In those specific circumstances, the NEPA permits a new generator to lock in a single price for its first three years in the market. *PJM*, 128 F.E.R.C. ¶ 61,157, at ¶ 101 (2009).

B. The Maryland Program

1. This case concerns a program instituted by the State of Maryland to develop new generation resources. In 1999, Maryland abandoned the vertical-integration model it had historically overseen to provide electricity and enacted in its place a market-based approach to electric-energy supply. Pet. App.

13a, 63a. The State decoupled entities that generate electricity from those that supply it to end users. *Ibid.* As a result, utilities in Maryland began to purchase electricity in the PJM wholesale markets. *Id.* at 13a. Capacity is sold to PJM. *PJM EnergyPlus, LLC* v. *Solomon*, 766 F.3d 241, 248 (3d Cir. 2014), petitions for cert. pending, No. 14-634 (filed Nov. 26, 2014), and No. 14-694 (filed Dec. 10, 2014). The load-serving entities—local electric distribution companies and competitive electric suppliers that sell electricity directly to consumers—purchase capacity from PJM. *Ibid.*; see pp. 7-8, *supra*; pp. 30-31 *infra*. When energy is later purchased or sold in PJM's day-ahead and real-time markets, the transmission system operated by PJM is used to transfer energy from generators to local distribution companies. *Solomon*, 766 F.3d at 248.

Approximately a decade after adopting this new approach to electricity supply, Maryland officials came to the view that PJM's capacity auction was failing to incentivize enough new generation. Pet. App. 13a, 64a. They regarded the auction's three-year time horizon as inadequate for generators to assess whether additional resources were warranted. *Id.* at 122a-123a. They contended that the auction was not encouraging sufficient new generation in Maryland, which "sits in a highly congested portion of the regional electric transmission system," and that the lack of new generation caused Maryland consumers to pay too high a price for electricity. J.A. 160; see J.A. 281-286; Pet. App. 13a-14a.[4] Petitioner CPV Maryland,

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[4] PJM divides its capacity market into several locational deliverability areas (LDAs). Part of Maryland falls within an LDA called the Southwest Mid-Atlantic Area Council. See Monitoring Ana-

LLC (CPV) asked FERC to revise PJM's rules to expand the NEPA three-year price guarantee to ten years. Pet. App. 26a.

FERC rejected that proposal. *PJM*, 126 F.E.R.C. ¶ 61,275, at ¶ 146, order clarified, 127 F.E.R.C. ¶ 61,104, order clarified on reh'g, 128 F.E.R.C. ¶ 61,157 (2009); see *PJM*, 128 F.E.R.C. ¶ 61,157, at ¶¶ 103-104. The Commission concluded that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the auction's balance between new and existing generation. *PJM*, 126 F.E.R.C. ¶ 61,275, at ¶ 149; see *id.* ¶ 150; see also 128 F.E.R.C. ¶ 61,157, at ¶ 103 (extending the NEPA would guarantee the new entrant its price "while the extra capacity introduced by the new entrant reduces the market prices that can be earned by all other suppliers").

After FERC rejected Maryland's proposal, the State instituted its own program to incentivize development of new natural-gas fired electric generation within Maryland's borders. The Maryland Public Service Commission adopted Maryland's final plan—the Generation Order—in 2012. Pet. App. 13a-14a, 117a-118a. The program compels electric distribution companies to enter into long-term (20-year) contracts with a generator selected by the State. *Id.* at 14a. Under the state-mandated contracts, the electric distribution companies must make payments to the generator at a specified rate and amount tied to the generator's wholesale sales of capacity. But the elec-

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lytics, LLC, *State of the Market Report for PJM: January through September* 201, fig. 5-3 (Nov. 12, 2015), http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2015/2015q3-som-pjm.pdf.

tric distribution companies do not actually purchase capacity (or electricity) from the generator under those contracts. Instead, the generator must bid its capacity directly into and clear the PJM capacity auction. If the generator clears, it sells its capacity *to PJM* at the clearing price. If the auction clearing price is below the price set in the state-mandated contracts between the generator and the electric distribution companies, the electric distribution companies must pay the generator the difference between the clearing price and the state-mandated contract price, thereby providing a long-term guaranteed revenue stream to the state-selected generator. If the auction clearing price is above the contract price, the generator must pay the difference to the electric distribution companies. *Ibid.* The result is that the ultimate price for the generator's capacity, after combining the PJM auction clearing price with any additional payments made to the generators by the electric distribution companies (or vice versa), is locked in at a fixed rate set by the state-mandated contracts.

2. The enactment of the Maryland program and a similar program in New Jersey[5] precipitated a change

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[5] In 2011, New Jersey adopted a substantively similar program called the Long Term Capacity Pilot Program Act. *Solomon*, 766 F.3d at 246, 248. The New Jersey program compels electric distribution companies to enter into similar contracts with generators selected by the State that require the distribution companies to pay the difference between the contract price and the auction clearing price for 15 years. *Id.* at 248-249. The Third Circuit held that the New Jersey program is preempted by the FPA. *Id.* at 250-254. Two pending petitions for writs of certiorari seek review of that decision. See *CPV Power Holdings, LP* v. *PPL EnergyPlus, LLC* (No. 14-634); *Fiordaliso* v. *PPL EnergyPlus, LLC* (No. 14-694).

in PJM's minimum-offer-price rule. The PJM auction's original rule included multiple exemptions, including one for offers submitted by state-mandated resources. Pet. App. 12a; *Hanna*, 977 F. Supp. 2d at 390-391. That exemption would have enabled a new generator selected by Maryland to bid zero in every auction, ensuring that the generator cleared the auction and received the state-guaranteed subsidies. See *Hanna*, 977 F. Supp. 2d at 390.

In response to a complaint filed by certain power providers operating in the PJM region, the Commission accepted PJM's proposal to eliminate the exemption from the minimum-offer-price rule for state-mandated resources. See *PJM*, 135 F.E.R.C. ¶ 61,022, at ¶¶ 1-3, 139-143, order clarified on reh'g, 137 F.E.R.C. ¶ 61,145 (2011), petitions denied *sub nom. New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74 (3d Cir. 2014); see also *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶¶ 78, 87-88 (2011), petitions denied *sub nom. New Jersey Bd. of Pub. Utils.*, *supra*. The Commission recognized that States "have their own policies and objectives that they wish to carry out, and the benefits of some of these policies and objectives may not be recognized in the [Reliability Pricing Model] construct generally or the [minimum-offer-price rule] in particular." *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶ 3. The Commission stated that its "intent [wa]s not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives." *Ibid.* The Commission concluded, however, that removal of the exemption was necessary to prevent "subsidized entry supported by one state's or locality's policies" from "disrupting the competitive price sig-

nals that [the auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." *Ibid.* The Third Circuit upheld the Commission's order in all respects, including its elimination of the exemption for state-mandated resources, against challenges brought by Maryland and others. See *New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74, 79-80 (2014).

C. Procedural History

Petitioners are the generator (CPV) selected by Maryland under its Generation Order, and the Commissioners of the Maryland Public Service Commission. Respondents are incumbent power generators. Pet. App. 65a n.4. Respondents filed suit in federal district court, seeking a declaration that the FPA preempts the Generation Order. *Id.* at 65a-66a. After a bench trial, the district court held that Maryland's program is field preempted. *Id.* at 62a-194a.

1. The district court agreed with petitioners that States have the authority to "(1) take regulatory action to require existing generation facilities to retire; (2) limit the type or amount of generation facilities constructed in the state; (3) promote certain environmentally desired types of generation facilities; and (4) determine the siting or location of a new generation facility within the state." Pet. App. 138a. The court concluded, however, that "after a generator physically comes into existence and operation and participates in the wholesale electric energy market, the prices or rates received by that generator in exchange for wholesale energy and capacity sales are within the sole purview of the federal government." *Ibid.* The court explained that the Generation Order is preempted because it seeks to secure new genera-

tion by setting the prices to be received by the state-selected generator for its capacity sales in the wholesale market. *Id.* at 161a-163a.

Because the district court concluded that the Generation Order is field preempted, it did not address whether Maryland's program is invalid under a conflict-preemption theory. Pet. App. 163a-164a.

2. The court of appeals affirmed, Pet. App. 1a-28a, concluding that the Generation Order is preempted under both field- and conflict-preemption theories, *id.* at 19a-28a. The court explained that the Generation Order is field preempted because, by requiring the state-selected generator to bid into and clear the federally-approved PJM auction—and then providing that generator a fixed payment in addition to what the generator receives from PJM—Maryland "effectively supplant[s] the rate generated by the auction with an alternative rate preferred by the state." *Id.* at 19a.

The court of appeals stressed that its field-preemption holding was of "limited scope" and was "addressed to the specific program at issue." Pet. App. 23a. The court thus stated that it was not expressing any opinion on "other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative," and it made clear that "not every state statute that has some indirect effect on wholesale rates is preempted." *Ibid.* (citation and internal quotation marks omitted). But it concluded that here "the effect of the Generation Order on matters within FERC's exclusive jurisdiction is neither indirect nor incidental." *Id.* at 23a-24a.

The court of appeals further concluded that the Generation Order is preempted due to a conflict with

the FERC-approved program. Pet. App. 24a-28a. The court explained that "the Generation Order has the potential to seriously distort the PJM auction's price signals," which are intended to incentivize new generation, by "substituting the state's preferred incentive structure for that approved by FERC." *Id.* at 25a. The court further explained that the Generation Order conflicts with FERC's three-year NEPA for new generators, "which represents an exception to PJM's otherwise steadfast commitment to a uniform market clearing price" for generators. *Id.* at 26a.

The court of appeals rejected petitioners' argument that the Generation Order is not preempted because the Commission's 2011 revision to the minimum-offer-price rule explicitly accommodated the participation of state-subsidized plants in the auction. Pet. App. 27a. In the court's view, "[t]he fact that FERC was forced to mitigate the Generation Order's distorting effects * * * tends to confirm rather than refute the existence of a conflict." *Ibid.* The court again emphasized that "not every state regulation that incidentally affects federal markets is preempted," but concluded that the Generation Order is "a direct and transparent impediment to the functioning of the PJM markets." *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

A. The Maryland program is preempted. By requiring a state-selected generator to bid into and clear the PJM capacity auction before receiving a subsidy that is directly tied to the auction's clearing price, the program directly targets the PJM market mechanism for setting the wholesale capacity rate. This Court has made clear that "measures aimed directly at interstate purchasers and wholesales for resale" are

preempted. *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015) (emphasis and citation omitted); see *id.* at 1599. The Generation Order takes direct aim at the PJM capacity market by attempting to implement its own regulatory framework for incentivizing new generation as a direct overlay on the PJM auction.

The Maryland program also directly interferes with the operation of the wholesale capacity market and the setting of the federally-regulated wholesale rate. The state program's requirement that its selected generator receives payments if it bids into and clears the PJM auction distorts the auction's price signals and displaces economically efficient bids. If a state-supported bid clears the auction market when it would not have done so without the state support, another unsupported bid (which otherwise would have cleared) may not clear. The lower market-clearing price that results from the state-supported generator's mandated participation and clearing affects all participants in the PJM region and distorts the price signals that would otherwise indicate a need for new capacity.

State subsidization, combined with state-mandated bidding and clearing, can suppress the price set by federally-regulated capacity markets even where the generators comply with the FERC-adopted minimum-price-offer rule. That rule is a default mechanism. But Maryland's program would allow a state-selected generator to bid the minimum-offer default price—even if its actual costs are higher than the default price—once the generator accounts for the offset to its costs from the state-mandated supplemental payments it receives. That uneconomic entry suppresses the price signals that would otherwise notify other

generators in States throughout the PJM region that new capacity is needed. By enabling a state-selected generator to clear the PJM auction aided by a subsidy when it otherwise would not, Maryland's program displaces more efficient capacity that would have otherwise cleared, which undermines the Commission's goal to ensure an economically efficient PJM market. And even if the modification of the minimum-offer-price rule prevented any distortive effect, the need for the Commission to take corrective measures indicates the existence of a jurisdictional intrusion by the State.

Petitioners analogize the contracts required by the Maryland program to traditional bilateral contracts. But the contracts do not provide for the purchase of capacity in exchange for a fixed payment. Rather, they are simply mechanisms to guarantee additional compensation to CPV for wholesale capacity that it sells to PJM. If Maryland had instead ordered its utilities to enter into bilateral contracts with the state-selected generator to build new capacity, the utilities may have tried to sell that capacity into the PJM auction, but they would not have been required to do so. And a bilateral contracting requirement that occurred outside the PJM auction might also be more in line with Maryland's purported goal to increase the amount of capacity in the region. Under Maryland's program, the state-selected generator bids its capacity into the auction, which displaces other resources but does not necessarily increase the amount of capacity in PJM.

B. Affirmance of the court of appeals' decision will not stifle the States' ability to encourage new generation of clean energy. States can incentivize new con-

struction directly, limit new construction to certain types of generation resources, and require the retirement of generation facilities in ways that have an indirect effect on the wholesale capacity market. Indirect methods of incentivizing new generation may also include the use of tax-exempt bonding authority, property tax relief, favorable site-lease agreements on public lands, the gifting of environmentally damaged property for brownfield development, and the relaxing or accelerating of permit approvals. States may also create programs that require local utilities to purchase a percentage of electricity from a particular generator or from renewable resources, or to use renewable energy certificates.

A State's regulatory choices may come with costs. Here such costs are the result of Maryland's participation in an interstate energy market that uses a market mechanism to set the price for wholesale capacity in the entire region. If a generation facility is constructed without clearing the capacity auction, it may still offer electricity into the energy market, but the capacity market will not enable that resource to recover a portion of its fixed costs from load-serving entities throughout the PJM region.

ARGUMENT

A. Maryland's Program Is Preempted

Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California* v. *ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989) (citations omitted). Federal law must also prevail

where "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012) (brackets in original) (quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995)). This Court recently explained in *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591 (2015), that whether state regulation operates within a preempted field under the analogous Natural Gas Act, 15 U.S.C. 717 *et seq.*,[6] may depend on "the target at which the state law aims." 135 S. Ct. at 1599 (emphasis omitted). State regulation thus will be preempted if it is "aimed directly at * * * wholesales for resale." *Id.* at 1600 (emphasis and citation omitted). Under those precedents, the Maryland program is preempted.

1. Section 824(b) of the FPA grants FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). One of FERC's core regulatory duties within that grant of exclusive jurisdiction is to ensure that "[a]ll rates and charges" that are "made, demanded, or received by any public utility for or in connection with" wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," are "just and reasonable." 16 U.S.C. 824d(a); see 16 U.S.C. 824d(b), 824e(a). Under the market-based rate approach that FERC employs in the wholesale capacity market for electricity, wholesale rates are determined through Commission-approved and regulated regional markets

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[6] Because the relevant provisions of the FPA and the Natural Gas Act "are in all material respects substantially identical," this Court "cit[es] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

like the one operated by PJM. See *Maryland Pub. Serv. Comm'n* v. *FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (per curiam).

a. The Maryland program is preempted because, by requiring the state-selected generator to bid into and clear the PJM capacity auction as a prerequisite to receiving state-mandated subsidies for its new capacity in addition to the clearing price that it receives from PJM, it directly targets the PJM market mechanism for determining wholesale capacity rates. Within that exclusive federal field, the Generation Order partially displaces the market mechanism for setting wholesale price signals for new generators.

In decisions addressing both the FPA and the Natural Gas Act, this Court has made clear that, at a minimum, state-law "measures aimed directly at interstate purchasers and wholesales for resale" are preempted. *Oneok*, 135 S. Ct. at 1600 (emphasis omitted) (quoting *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 94 (1963)). The Court thus has recognized a "significant distinction" for purposes of preemption "between measures *aimed directly* at interstate purchasers and wholesales for resale, and those aimed at subjects left to the States to regulate." *Ibid.* (citation and internal quotation marks omitted); see, *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306-308 (1988) (holding preempted a state law capping a natural gas company's equity levels that was "directed at" suppressing wholesale rates); *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 514 (1989) (finding no preemption of a state regulation concerning the timing of gas production, even though the regulation might affect the costs and prices of wholesale sales, because the

state regulation was aimed at protecting natural gas producers—"a matter firmly on the States' side" of the jurisdictional dividing line).

In *Oneok*, the Court considered whether FERC's jurisdiction over practices affecting wholesale rates for natural gas preempted the application of state antitrust laws to a practice that affected both wholesale and retail rates. 135 S. Ct. at 1599. The Court explained that whether a state regulation falls within the preempted field depends on "the target at which the state law aims." *Ibid.* (emphasis omitted). The Court concluded that, unlike state regulations that are "aimed directly at * * * wholesales for resale," *id.* at 1600 (emphasis and citation omitted), the plaintiffs' state antitrust claims were not preempted because antitrust laws "are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace," *id.* at 1601. The claims in *Oneok* sought "to challenge the background marketplace conditions that affected both jurisdictional and nonjurisdictional rates," rather than "to regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." *Id.* at 1602 (citation and internal quotation marks omitted).

Unlike the state antitrust claims in *Oneok*, the Generation Order takes direct aim at the PJM capacity market by attempting to implement Maryland's own regulatory framework for incentivizing new generation through the mechanism of the PJM auction. The program mandates that the state-selected generator receive the amount set forth in its state-mandated contracts with electric distribution companies, which are directly tied to the generator's sales of capacity into the PJM market. See pp. 11-12, *supra*.

Indeed, Maryland adopted the program because state officials believed that the price signals produced by PJM's wholesale capacity auction were not incentivizing sufficient new generation in the PJM region. Pet. App. 13a.

The Generation Order, by providing long-term supplemental payments in addition to the PJM clearing price, makes it possible for new generation in Maryland to enter a FERC-regulated market that would otherwise not provide price signals sufficient to attract that entry. The program therefore supplants the Commission-approved market-based mechanism for ensuring the most efficient supply of capacity with the State's own view of what wholesale price is needed to incentivize new generation.

In this respect, the Maryland program is like state regulations that the Court has previously found preempted by FERC's exclusive jurisdiction. In *Schneidewind*, for example, the Court concluded that a Michigan law that sought to regulate securities issued by interstate natural-gas companies was preempted because it would have permitted the State to prevent a natural-gas company from raising its equity levels above a certain point, thus "ensur[ing] that the company w[ould] charge only what Michigan consider[ed] to be a 'reasonable rate.'" 485 U.S. at 308; see *id.* at 296-298, 310. The Maryland program similarly targets the wholesale market by guaranteeing a level of compensation—different from the compensation provided by the PJM auction—that a state-selected generator will receive in connection with its wholesale sales of capacity to PJM.

Similarly, in *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), the Court held that

the FPA preempted a state determination of the reasonableness of FERC-mandated payments for the sale of nuclear power to wholesale suppliers of electricity, which led to higher retail electricity rates. *Id.* at 372-377. The Court explained that, even where a State acts within the scope of its authority to set retail rates and conduct prudence reviews, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." *Id.* at 371. Here too, even though the State purports to invoke its authority to regulate generation facilities, 16 U.S.C. 824(b)(1); see *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-206 (1983), it may not do so in a way that directly aims at and undermines the wholesale capacity rates produced by the PJM auction mechanism that the Commission approved in the exercise of its exclusive authority over wholesale rates and practices affecting those rates. As the court of appeals concluded, the effect of the Maryland program "on matters within FERC's exclusive jurisdiction is neither indirect nor incidental." Pet. App. 23a-24a.

b. The Maryland program is also preempted because it directly interferes with, and thus conflicts with, the operation of the wholesale capacity market and the setting of the federally-regulated wholesale rate. Under its program, the State conducts its *own* bidding process to identify generators that will construct facilities for new generation, requires electric distribution companies to enter into arrangements that guarantee that the selected generators will receive a set price for their new capacity, and requires the selected generators to bid that capacity into and

clear the PJM auction. Pet. App. 13a-14a. And the electric distribution companies must pay the difference between the clearing price and the price of new generation set through the Maryland program even though they do not actually purchase capacity under those contracts. *Id.* at 14a.

The state program's requirement that its selected generator receive payments if it bids into and clears the PJM auction distorts the auction's price signals and displaces economically efficient bids. See *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶ 3 (2011) ("[S]ubsidized entry supported by one state's or locality's policies" may "disrupt[] the competitive price signals that [the auction] is designed to produce."), petitions denied *sub nom. New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74 (3d Cir. 2014). If a state-supported bid clears the auction market when it would not have done so without the state support, another unsupported bid (which otherwise would have cleared) may not clear. And lower market-clearing prices that result from a state-supported generator's mandated participation and clearing affect all participants in the multi-state PJM market and distort the price signals that indicate a need for new capacity. See Pet. App. 95a-98a, 125a-126a.

Petitioners and amici claim (Md. Br. 44-48; CPV Br. 55-58; Nat'l Ass'n of Regulatory Util. Comm'rs Amicus Br. 15; NRG Energy, Inc. (NRG) Amicus Br. 25-26) that the Commission's 2011 amendment to the minimum-offer-price rule, which eliminated the exemption for state-sponsored entry into the PJM capacity market that permitted such resources to bid zero as "pricetakers," minimizes any price-skewing effects of state-subsidized entry. But state subsidiza-

tion, combined with state-mandated bidding and clearing, can have a price-suppressive effect on federally-regulated capacity markets even where the generators comply with the FERC-adopted minimum-offer-price rule. See Pet. App. 25a-26a. That rule is a default mechanism. See *id.* at 95a-97a. Under Maryland's program, a state-selected generator can bid the minimum-offer default price—even if the generator's actual costs are higher than the default price—once the generator accounts for the offset to its costs from the state-mandated supplemental payments it receives.

Such an uneconomic entry would suppress price signals resulting from the Reliability Pricing Model, which could in turn cause generators in all States throughout the PJM region to become hesitant to expand generation capacity. Pet. App. 95a-97a. Thus, by requiring selected generators to bid their capacity into and clear the Commission-approved PJM auction and guaranteeing a level of compensation for that capacity, the program directly interferes with the market mechanisms that the auction uses to set wholesale capacity rates. And in enabling a state-selected and state-subsidized generator to clear the PJM auction when it otherwise would not, Maryland's program displaces more efficient capacity that would have otherwise cleared. That result undermines the Commission's goal to ensure an economically efficient PJM market. See *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶ 2 ("The long-term viability of the PJM market demands an assurance of competitive offers.").

Furthermore, even if the modification of the minimum-offer-price rule did actually prevent the distortive effect, the Maryland program would still be

preempted. That the Commission was compelled to take steps to address Maryland's direct interference does not vitiate the *jurisdictional* intrusion. To the contrary, "[t]he fact that FERC was forced to mitigate the Generation Order's distorting effects * * * tends to confirm rather than refute the existence of a conflict." Pet. App. 27a; cf. *Northwest Cent. Pipeline*, 489 U.S. at 518 ("The [Natural Gas Act] does not require FERC to regulate around a state rule the only purpose of which is to influence purchasing decisions of interstate pipelines, however that rule is labeled. Such a rule creates a conflict rather than demands an accommodation."); *Northern Natural Gas*, 372 U.S. at 92-93 ("It may be true * * * that accommodation on the part of the [Commission] could avoid direct collision—but this argument misses the point. Not the federal but the state regulation must be subordinated."); *Maryland* v. *Louisiana*, 451 U.S. 725, 751 (1981).

Maryland contends (Br. 46-48) that the Commission has foreclosed the conclusion that the Generation Order distorts the wholesale capacity market because the Commission found that capacity resources clearing the auction are competitive and that eliminating the exemption for state-mandated resources resolved any tension between state policies and wholesale ratemaking. See *PJM*, 135 F.E.R.C. ¶ 61,022, at ¶ 177, order clarified on reh'g, 137 F.E.R.C. ¶ 61,145 (2011), petitions denied *sub nom. New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74 (3d Cir. 2014); see also *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶¶ 3-4. In its ruling, however, the Commission made no determination as to preemption of the State's program itself. The Commission addressed only the legally distinct

question of the reasonableness of the ultimate rates produced by the auction after FERC's modification of the minimum-offer-price rule.

c. Contrary to petitioners' contention (Md. Br. 28-32; CPV Br. 29-31), the fact that Maryland's program may affect generation and retail rates does not call for a different result. The respective powers of FERC and the States under the FPA are not symmetrical. The FPA expressly grants FERC jurisdiction over "[a]ll rates and charges made, demanded, or received * * * in connection with" wholesale sales, but the FPA also requires FERC to ensure that "any rule, regulation, practice, or contract affecting [a wholesale] rate" is "just and reasonable" and not "unduly discriminatory or preferential." 16 U.S.C. 824d(a), 824e(a); see 16 U.S.C. 824d(b). By the same token, the FPA generally reserves to the States the power to regulate generation and retail sales of electricity. 16 U.S.C. 824(b)(1). But the FPA does not provide that the States shall have authority—to the exclusion of FERC—over all practices "affecting" generation or rates for retail sales. And under the Supremacy Clause, federal regulation within the scope of FERC's jurisdiction must prevail over state regulation. State programs that directly target rates charged for wholesale sales—like Maryland's program here—are therefore preempted.

This absence of symmetry is illustrated as well by *FERC* v. *Electric Power Supply Association*, No. 14-840 (argued Oct. 14, 2015) (*EPSA*). There, the respondents argue that FERC's regulation of the payments made for demand-response bid into wholesale energy markets operated by Regional Transmission Organizations like PJM exceeds FERC's authority.

In *EPSA*, on the one hand, the rates paid for demand response in wholesale markets directly "affect[]" the rates paid for actual sales of energy into those same markets and therefore are subject to the express grant of jurisdiction to FERC over such rates and practices. And on the other hand, *EPSA* does not involve any regulation by FERC of actual *retail* sales or the rates charged in such sales. The respondents in *EPSA* argue that FERC's order prescribing rates paid for demand response bid into wholesale markets nevertheless exceeds FERC's jurisdiction because it affects the retails market by creating an "effective" price for retail transactions that consists of the price the retail customer would pay if it actually engaged in such a transaction plus the incentive forgone if the customer did so. As the government explains in *EPSA* (Reply Br. at 10-12, No. 14-840 (Sept. 30, 2015)), however, while FERC's regulation of demand response in wholesale markets may indirectly affect retail prices, a financial incentive not to engage in an economic transaction is not the legal or functional equivalent of actual regulation by FERC of the terms of an actual retail sale.

In any event, in this case Maryland can choose to have a system for supplying electricity to its citizens that does not depend on its utilities' participation in wholesale markets operated by PJM under FERC's jurisdiction. So too in *EPSA*, a State can prohibit its retail customers from bidding demand response into (or from purchasing power in) wholesale markets that are subject to FERC's jurisdiction. But in either case, if the entity does participate in a FERC-regulated wholesale market, it must, under the Supremacy Clause, do so under FERC's rules.

2. Petitioners and amici attempt (Md. Br. 40-43; CPV Br. 34-35; Am. Pub. Power Ass'n et al. Amicus Br. 8-9) to characterize the contracts required by the Maryland program as equivalent to traditional bilateral contracts, producing "the same incentives and same outcomes as would a sale of CPV's capacity to the distribution utilities, who then would resell it to PJM." Md. Br. 41. But the contracts required by the Maryland program are not bilateral contracts for the actual purchase and sale of capacity. See *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 545-546 (2008) (bilateral contracts between willing buyer and seller, negotiated in good faith, can be presumed to be just and reasonable). The program instead requires the generator's promised capacity to be bid into the PJM auction and sold *to PJM* for the clearing price. See Pet. App. 21a. As a result, the additional guaranteed compensation paid to the generator by the electric distribution companies is not for capacity, but rather is simply the means of imposing the state-mandated guarantee of additional compensation for wholesale capacity that is sold to PJM.

PJM, for its part, does not require *new* capacity—whether supplied by a generator or acquired by a utility in a bilateral contract—to be bid into the PJM capacity auction. Cf. PJM, *PJM Open Access Transmission Tariff*, Attach. DD § 6.6 (Sept. 17, 2010) (creating a "must-offer" requirement for *existing* capacity resources).[7] A state requirement that utilities purchase new capacity in a true bilateral contract with a state-selected generator therefore would not, in and of

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[7] http://www.pjm.com/media/documents/merged-tariffs/oatt.pdf.

itself, distort the auction's price signals or displace existing capacity in the auction. PJM does, however, require a utility to bid and clear any new capacity it purchases into the PJM market in order for that capacity to be credited toward that utility's share of PJM's purchase of total capacity needs. See Reliability Assurance Agreement, Art. 7.3. An electric distribution company may therefore desire to bid new capacity that it purchases through a bilateral contract into the PJM auction. But the utility's decision to bid its purchased capacity into the auction is different from a state mandate to do so—at least if (as is true for a new generator under the Maryland program) the State mandates different compensation than the FERC-approved mechanism provides.

A bilateral contracting requirement that occurred outside the PJM auction might also be potentially more in line with Maryland's purported goal in adopting the Generation Order to increase the amount of capacity in the region. See Pet. App. 13a-14a (finding that Maryland wanted to incentivize generation in the Mid-Atlantic region, where the State believed there was a heightened risk of reliability problems due to lack of capacity); *id.* at 109a. Under Maryland's current program, in contrast, the state-selected and state-subsidized generator is required to bid its new capacity into and clear the auction, which displaces other, more efficient resources but does not necessarily increase the amount of capacity in PJM. See p. 7, *supra*.

B. Preemption Of Maryland's Program Does Not Eliminate States' Ability To Incentivize New Generation Resources

Petitioners and amici contend (Md. Br. 31-32; CPV Br. 30; States' et al. Amicus Br. 16-21; Nat'l Governors Ass'n et al. Amicus Br. 29; NRG Amicus Br. 18) that an affirmance by this Court of the decision below will stifle the States' ability to encourage new generation of clean energy. But if the Court holds that the specific Maryland program at issue here is preempted, the States will retain significant authority to promote new generation of clean energy within their reserved jurisdiction over the facilities used for generation of electric energy. See 16 U.S.C. 824(b)(1).

1. A holding that the Maryland program is preempted would not disable States from taking any action that has an effect on supply or demand in the wholesale market. Under the FPA, States retain jurisdiction over facilities used for the generation of electric energy. 16 U.S.C. 824(b)(1). States can incentivize the construction of new generation facilities, limit new construction to certain types of generation resources, and require the retirement of generation facilities, in ways that may have an indirect effect on the wholesale capacity market. See, *e.g.*, *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009), cert. denied, 558 U.S. 1110 (2010); see also *PPL EnergyPlus, LLC* v. *Solomon*, 766 F.3d 241, 255 (3d Cir. 2014) (finding New Jersey program preempted but stating that "states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility[,] [o]r states may elect to build no electric generation facilities at all") (citing *Connecticut*, 569 F.3d at 481), petitions for cert. pend-

ing, No. 14-634 (filed Nov. 26, 2014), and No. 14-694 (filed Dec. 10, 2014). Such choices "affect the pool of bidders" in the capacity auction, "which in turn affects the market clearing price for capacity." *Connecticut*, 569 F.3d at 481. But when a State "regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." *Solomon*, 766 F.3d at 255; see Pet. App. 27a ("[N]ot every state regulation that incidentally affects federal markets is preempted.").

Indirect methods of incentivizing the construction of new generation facilities may include, for example, the "utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals." *Solomon*, 766 F.3d at 253 n.4 (quoting *PPL EnergyPlus, LLC* v. *Hanna*, 977 F. Supp. 2d 372, 404 (D.N.J. 2013), aff'd *sub nom. Solomon*, *supra*) (citing record evidence of such methods); see Pet. App. 170a (noting State's ability to finance construction of a power plant, issue bonds to fund such construction, or build (and/or operate) a generation facility). Indeed, States are free to require procurement of new generation resources, even if the price signals in the regional wholesale capacity market indicate that no new resources are needed. See *ISO New Eng., Inc.*, 135 F.E.R.C. ¶ 61,029, at ¶ 171 (2011), order clarified on reh'g, 138 F.E.R.C. ¶ 61,027 (2012). None of those methods would be directly aimed at the Commission-approved wholesale auction by providing a subsidy tied to the auction price for sales made to PJM.

2. Petitioners' amici contend (see, *e.g.*, States' et al. Amicus Br. 16-21) that the decision below calls into question bilateral contracts for the purchase of capacity or state requirements that utilities enter into such contracts with particular types of generators. But that is not the case. Permissible state programs may include a requirement that local utilities purchase a percentage of electricity from a particular generator or from renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements. See, *e.g.*, *Midwest Power Sys., Inc.*, 78 F.E.R.C. ¶ 61,067, at 61,246 (1997) (Iowa statute not preempted "to the extent that [it] require[s] [state] utilities * * * to purchase from certain types of generating facilities").

In *Allco Finance Ltd.* v. *Klee*, No. 13-cv-1874, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), aff'd on other grounds, 805 F.3d 89 (2d Cir. 2015), for example, a district court considered a Connecticut program that compelled electric distribution companies to enter into bilateral contracts to purchase up to four percent of Connecticut's electricity needs for a term of up to 20 years from in-state, state-selected renewable projects. *Id.* at *1. The court rejected a claim that the program was preempted by FERC's authority over wholesale sales of electricity. *Id.* at *6-*10. The court explained that, unlike the Maryland program, the Connecticut program was "devoid of any * * * market-distorting features that encroach [upon] FERC's exclusive jurisdiction over setting wholesale rates." *Id.* at *10. The Connecticut law did not directly distort the wholesale market because Connecticut required the electric distribution companies to purchase renewable energy

directly from the selected generators, rather than requiring the generators to sell their capacity to a FERC-approved wholesale-market operator through its auction. *Ibid.*

3. States' regulatory choices may come with costs. But those costs here are the result of Maryland's decision to require participation in an interstate energy market that uses a market mechanism to set the price for wholesale electric capacity in the entire region. A generation facility that is constructed without clearing the capacity auction may offer electricity into the energy market without taking on the obligations or receiving the payments that come with clearing the capacity market. But in that event, the capacity market will not enable that resource to recover a portion of its fixed costs through capacity payments from load-serving entities throughout the PJM region. Although Maryland retains authority over generation facilities, it may not promote its own policies by targeting a generator's actual sales to PJM that occur through a FERC-approved mechanism for setting capacity rates in a multistate region.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General

MAX MINZNER
General Counsel
ROBERT H. SOLOMON
Solicitor
CAROL J. BANTA
KARIN L. LARSON
LISA B. LUFTIG
ROSS R. FULTON
Attorneys
Federal Energy Regulatory Commission

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